In The

Supreme Court of the United States

October Term, 1977

No. ——— 77-1863

JAMES MITCHELL, Superintendent of the Virginia State Penitentiary,

Petitioner,

v.

RAYMOND BRADLEY NOTTINGHAM, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

J. MARSHALL COLEMAN
Attorney General of Virginia

JAMES E. KULP
Deputy Attorney General

900 Fidelity Building
830 East Main Street
Richmond, Virginia 23219

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

In The

Supreme Court of the United States

October Term, 1977

No. ———

JAMES MITCHELL, Superintendent of the Virginia State Penitentiary,

Petitioner,

v.

RAYMOND BRADLEY NOTTINGHAM, JR.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

James Mitchell (in the place of Robert F. Zahradnick), Superintendent of the Virginia State Penitentiary, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on April 3, 1978, in the case of Raymond Bradley Nottingham, Jr. v. Robert F. Zahradnick, Superintendent of the Virginia State Penitentiary.

OPINIONS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, dated March

17, 1976, is unreported but is included herein as Appendix A. The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 573 F.2d 193, and is also included herein as Appendix B.

JURISDICTION

The jurisdiction of this Court to issue the Writ of Certiorari in this case is grounded upon 28 U.S.C., Section 1254(1).

STATUTES INVOLVED

§ 16.1-127. *Courts may conduct preliminary examinations.* In addition to the power and authority conferred by this chapter on courts not of record having criminal jurisdiction, each such court shall have power to conduct preliminary examinations of persons charged with crime within its jurisdiction in the manner prescribed in chapter 6 (§ 19.2-90 et seq.) of Title 19.1.

§ 16.1-142 (replaced by 16.1-229). *This chapter controlling in event of conflict.*—Whenever any specific provision of this chapter differs from or is in conflict with any provision or requirement of any other chapters of this title relating to the same or a similar subject, then such specific provision shall be controlling with respect to such subject or requirement.

§ 16.1-158 (replaced by § 16.1-241). *Jurisdiction.*—. . . [E]ach juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction, . . . over all cases, matters and proceedings involving:

• • • •

(7) The prosecution and punishment of persons, charged with . . . any . . . offense against a child except murder and

manslaughter; provided, that in prosecution for other felonies over which the court shall have jurisdiction, such jurisdiction shall be limited to that of examining magistrate.

QUESTIONS PRESENTED

(1) Did The United States Court Of Appeals For The Fourth Circuit Err In Finding That Jeopardy Attached At Respondent's First Trial?

(2) Assuming In The Alternative That The Virginia Supreme Court Had Not Ruled On The Question Of Whether Virginia Code § 16.1-158(7) Is Jurisdictional Or Procedural, Did The United States Court Of Appeals Err In Not Dismissing Respondent's Appeal Until The Question Could Be Resolved By The Virginia Supreme Court?

STATEMENT OF THE CASE

Raymond B. Nottingham, Jr., was given a preliminary hearing in the Criminal Division of the General District Court of Norfolk. Subsequently, he was indicted by a grand jury. The case proceeded to trial in the Circuit Court of the City of Norfolk where a jury was impaneled. During the prosecution's presentation of its case-in-chief, the trial judge learned that the robbery victim was seventeen at the time of the offense, and thus a juvenile under Virginia Code § 16.1-141(3). The trial judge then declared a mistrial on the ground that his court had no jurisdiction since the preliminary hearing should have been conducted in the Juvenile and Domestic Relations Court pursuant to the provisions of § 16.1-158(7).

After the mistrial was declared, Nottingham, an adult, had a preliminary hearing in the juvenile court, was reindicted and again brought to trial. Respondent's motion to have the proceedings dismissed on double jeopardy grounds

was denied. He was found quilty by the jury and sentenced to serve five years.

The Respondent petitioned the Supreme Court of Virginia for an appeal from this conviction, but did not raise the double jeopardy issue. The petition for a writ of error was denied by the Supreme Court of Virginia on December 3, 1974.

On April 14, 1975, the Respondent filed a petition for a writ of habeas corpus in the Supreme Court of Virginia attacking his conviction on the grounds of double jeopardy and that his counsel was ineffective for failing to present the double jeopardy issue on appeal. After requiring a response, the Supreme Court of Virginia denied the petition for writ of habeas corpus on September 17, 1975.

Respondent, thereafter, filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Norfolk Division, in which he alleged, among other things, that he had been subjected to double jeopardy. The District Court in finding that this allegation was a matter of state law which had been decided adversely to Respondent by the Supreme Court of Virginia dismissed the petition. Upon appeal, the Fourth Circuit Court of Appeals reversed the judgment of the District Court and ordered that a writ of habeas corpus issue.

ARGUMENT

I.

The United States Court Of Appeals Erred In Finding That Jeopardy Attached At Respondent's First Trial.

In reversing the District Court and granting a Writ of Habeas Corpus, the Court of Appeals has usurped the function of the Virginia General Assembly in establishing juris-

diction for Virginia Courts, and has completely disregarded the Supreme Court of Virginia as the interpretor of Virginia law.

The Court of Appeals based its decision on its interpretation of Virginia law which is directly contradictory to the clear and unmistakeable language of § 16.1-158(7) of the Virginia Code, and in conflict with the interpretation of this same statute by the Supreme Court of Virginia.

The establishing of jurisdiction of Virginia courts is vested with the General Assembly except as expressly provided in the Constitution of Virginia. In establishing the jurisdiction applicable in this case, the General Assembly has declared unequivocally that the juvenile and domestic relations courts shall have the *exclusive original jurisdiction* to conduct preliminary hearings in all prosecutions of persons charged with offenses against a juvenile, excepting murder and manslaughter.

The Court of Appeals has taken the explicit language "exclusive original jurisdiction" and interpreted it away to mean nothing more than concurrent jurisdiction. Such an interpretation flies in the face of the unambiguous language of the statute, and expands the jurisdiction of courts in Virginia in derogation of the specific mandate of the Virginia legislature.

The Court of Appeals has attempted to buttress its opinion by pointing to § 16.1-127 as granting other courts not of record concurrent jurisdiction to conduct preliminary examinations of persons charged with offenses against juveniles. Section 16.1-127 relates to the jurisdiction granted courts established under Chapter 7 of Title 16.1, and has nothing whatever to do with the juvenile and domestic relations courts established under Chapter 8 of Title 16.1. Additionally, the Court of Appeals' reasoning is faulty in view of the explicit language of § 16.1-142. This section makes it clear

that the provisions in Chapter 8, in which § 16.1-158(7) is found, controls and takes precedent over any other provisions in Title 16.1. Consequently, the provisions of § 16.1-158(7) control over the provisions of § 16.1-127.

Lower courts in Virginia, like their federal counterparts, derive their jurisdiction from enactments of the legislature, and this jurisdiction may not be expanded by court decision. Even though the jurisdiction of juvenile and domestic relations courts over adults charged with crimes against juveniles is that of examining magistrate, as noted by the Court of Appeals, this is not a basis for holding that preliminary hearings in such cases may be held in any court.

The Court of Appeals rationalized its decision upon the fact that the juvenile court statutes were not intended for the protection of those in the Respondent's position and his relationship with his juvenile victim was entirely fortuitous. The Petitioner agrees that the statute in question was not for the benefit of the Respondent, but in fact is for the benefit of the juvenile. And it is solely because the Respondent was involved with a juvenile that the legislature mandated that his case be handled *exclusively* in the juvenile and domestic relations court. The lack of familial relationship between the Respondent and his juvenile victim is of no consequence. The entire thrust of the law in question makes it clear that the legislature of Virginia intended that *every* case wherein a juvenile is involved, be he victim or accused, must be commenced in the juvenile and domestic relations court.

The wisdom of such legislation is, of course, no concern of the court for it is the duty and responsibility of the legislature of Virginia to determine where such cases will be heard, and not the prerogative of the Court of Appeals. This case is nothing more than an attempt by the Court of Appeals to substitute its judgment for that of the legislature of Virginia.

The opinion of the Court of Appeals is even more remarkable for its utter failure to address how the Supreme Court of Virginia interpreted the statute in issue in this very case. The Court of Appeals merely said that Respondent had exhausted his state remedies, never mentioning the decision of the Supreme Court of Virginia on this very issue, but proceeded to interpret Virginia law as though no decision of the highest court in Virginia even existed.

At his second trial, the Respondent raised the question of double jeopardy. The trial court ruled that jeopardy had not attached at Respondent's first trial since the preliminary proceedings had not commenced in the juvenile and domestic relations court thereby depriving the trial court of jurisdiction in the first trial. The trial court's ruling was consistent with Virginia law holding that statutes relating to juvenile court proceedings are jurisdictional and, thus, mandatory. *See Peyton* v. *French,* 207 Va. 73, 147 S.E.2d 739 (1966). The Respondent filed an appeal from his conviction, but did not raise the issue of double jeopardy.

Thereafter, Respondent filed a Petition for a Writ of Habeas Corpus in the Supreme Court of Virginia under its original jurisdiction wherein he raised the double jeopardy issue and brought into question § 16.1-158(7). A response was filed on behalf of the State raising the same defense presented to both the United States District Court and the United States Court of Appeals. The Virginia Supreme Court entered an Order on September 17, 1975, stating that it had maturely considered the petition and response and was of the opinion that the Writ of Habeas Corpus should not issue. In Virginia, this is a ruling on the merits of the issue raised. *Cf., Saunders* v. *Reynolds,* 214 Va. 697, 204 S.E.2d 421 (1974) (denial of writ of error on direct appeal). All of these matters were brought to the attention of the Court of Appeals, which for some reason chose to ignore

the decision of the Supreme Court of Virginia. The Court of Appeals wrote its opinion as though the issue had never been addressed by the Supreme Court of Virginia.

The Virginia Supreme Court has interpreted § 16.1-158(7) to mean what it says, that is, that preliminary hearings for adults charged with offenses against juveniles *must* commence in the juvenile and domestic relations court, and that this is a jurisdictional requirement. As such, no jeopardy attached in Respondent's first trial. Such an interpretation is consistent with prior Virginia cases holding that the failure of a juvenile court to comply with the applicable statutes rendered the circuit court proceedings void. *See Matthews* v. *Commonwealth,* 216 Va. 358, 218 S.E.2d 538 (1975); *Watts* v. *Commonwealth,* 213 Va. 57, 189 S.E.2d 346 (1972).

Matters of state law are to be interpreted by the highest court of the state and that interpretation is binding on federal courts. *Wichita Royalty Co.* v. *City National Bank,* 306 U.S. 103 (1939); *Lawrence* v. *Peyton,* 368 F.2d 294 (4th Cir. 1966), *cert. denied,* 386 U.S. 968 (1967); *Wilson* v. *Blabon,* 370 F.2d 997 (9th Cir. 1967).

The Court of Appeals is clearly bound by the interpretation the Supreme Court of Virginia has placed on § 16.1-158(7) and its holding that the failure to comply with the mandate of this section is jurisdictional and that the proceedings in Respondent's first trial were therefor void.

This Court has held in *United States* v. *Ball,* 163 U.S. 662 (1896) that where the first court is without jurisdiction, a plea of double jeopardy is unavailable at a second trial for the same offense. Accordingly, the Court of Appeals erred in granting the Writ of Habeas Corpus and finding that jeopardy attached at Respondent's first trial.

II.

Assuming In The Alternative That The Virginia Supreme Court Had Not Ruled On The Question Of Whether Virginia Code § 16.1-158(7) Is Jurisdictional Or Procedural, The Court Of Appeals Erred In Not Dismissing The Respondent's Appeal Until The Statute Could Be Interpreted By The Virginia Supreme Court.

If it is to be assumed that the Supreme Court of Virginia has never ruled on the question of whether § 16.1-158(7) is jurisdictional or procedural, the principals of comity which underlie the exhaustion of remedies doctrine mandate abstention in this case. The Court of Appeals granted habeas relief on the basis of its belief that Virginia Code § 16.1-158(7) is a procedural requirement allowing concurrent jurisdiction. Where it is apparent that the jurisdiction of state courts has not been definitely resolved, the state should not, if at all possible, be denied the opportunity to have its own tribunal interpret the unsettled state law. Thus, the state court would have the desirable opportunity to interpret the statute in accordance with its assessment of legislative intent and the impact of its interpretation on the state judicial system. *See Lawrence* v. *Peyton, supra.; James* v. *Copinger,* 428 F.2d 235 (4th Cir. 1970). The resolution of this case is clearly dependent on an interpretation of Virginia law as to whether § 16.1-158(7) is jurisdictional or procedural.

Additionally, resolution by the state court that § 16.1-158(7) is jurisdictional and thus mandatory would obviate the need to consider the constitutional question of double jeopardy. In such a situation, abstention by the federal court is always preferable. *See Fornais* v. *Ridge Tool Co.,* 400 U.S. 41 (1970); *Reetz* v. *Bozanich,* 397 U.S. 82 (1970).

The well-settled doctrine that a federal court will not anticipate a question of constitutional law and the special

weight that doctrine carries in the maintenance of harmonious federal-state relations requires that a federal court stay its proceedings until a potentially controlling state-law issue is authoritatively put to rest. *Baggett* v. *Bullitt,* 377 U.S. 360 (1964); *United Gas Pipeline Co.* v. *Ideal Cement Co.,* 369 U.S. 134 (1962).

The Petitioner submits that there are special circumstances justifying abstention in this case. First, the interpretation of the statute in question goes directly to the heart of the jurisdiction of Virginia courts. Second, if, as Petitioner believes, the interpretation placed upon § 16.1-158(7) by the Court of Appeals is erroneous, the Respondent would be discharged from the robbery conviction without any ability of the state to retry him. Third, Respondent is in custody on other charges and, excluding his robbery conviction, is not available for final release from state custody until September, 1979.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted, and the judgment in this case reversed or vacated.

Respectfully submitted,

J. MARSHALL COLEMAN
Attorney General of Virginia

JAMES E. KULP
Deputy Attorney General

900 Fidelity Building
830 East Main Street
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, James E. Kulp, Deputy Attorney General of Virginia, of counsel for the Petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 26th day of June, 1978, I mailed a copy of the foregoing Petition for a Writ of Certiorari to Peter S. Smith, Esquire, and Phillip G. Dantes, Esquire, Maryland Juvenile Law Clinic, 500 West Baltimore Street, Baltimore, Maryland 21202, counsel for Respondent.

JAMES E. KULP
Deputy Attorney General

APPENDIX

APPENDIX A

In The
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Norfolk Division

Raymond Bradley Nottingham, Jr.	)	
	)	
Petitioner,	)	Misc. No.
v.	)	75-537-N
	)	
Robert F. Zahradnick, Superintendent of the Virginia State Penitentiary	)	
	)	
Respondent.	)	

MEMORANDUM ORDER

Petitioner, a state court prisoner, signed a petition for a writ of habeas corpus, received by the Clerk of this Court, Norfolk, Virginia, on October 1, 1975.

Order of October 21, 1975, called upon respondent to answer, and answer was lodged November 18, 1975.

It is ORDERED that the late answer be filed.

It is ORDERED that Robert F. Zahradnick, Superintendent of the Virginia State Penitentiary, be substituted as the proper party respondent.

Petitioner was convicted in the Circuit Court of the City of Norfolk after his not guilty plea and a jury trial June 13, 1974, for the crime of robbery. Petitioner was sentenced to a term of five (5) years.

Upon writ of error, the trial court was affirmed December 3, 1974.

Petitioner filed state habeas corpus proceedings in the

Supreme Court of Virginia and same was dismissed by Order of September 17, 1975. In same, petitioner raised only the allegation of double jeopardy and ineffective assistance of counsel, because petitioner's attorney did not raise same on the writ of error and failed to argue same orally before the Supreme Court of Virginia.

The allegations of the instant petition refer to:

(1) Denial of sufficient time to obtain a necessary witness.

(2) Denial of sufficient time to prepare his defense.

(3) Trial in court dressed in prison attire.

(4) Invalid indictment.

(5) Double jeopardy.

(6) Ineffective assistance of counsel as counsel failed to raise the claim of double jeopardy on direct appeal.

This Court has before it the 106-page trial transcript and records.

In reference to allegations (1) and (2), same are fully covered in the state court transcript. Petitioner exhausted his state court remedies on these allegations upon direct appeal.

Petitioner was incarcerated in Richmond, and, on June 12, 1974, while playing basketball, was picked up and transported by officers to Norfolk for trial June 13, 1974. When the trial opened June 13, 1974, defense counsel, Beril Abraham, advised the Court of the above, and, in addition, that petitioner was emotionally upset that morning due to not having been able to sleep the night before, and was further prejudiced by appearing in Court in prison attire. The Court was further advised by Mr. Abraham that clothes were brought to petitioner that morning, but petitioner had not changed clothes as he had, had no opportunity to bathe. In addition, Mr. Abraham had only been advised yesterday afternoon, after petitioner's arrival, of a potential witness for the defense who petitioner advised him was named

Melvin Horne and who worked for Norfolk Packing Company in Norfolk. Mr. Abraham further advised the Court if the potential witness would testify as petitioner said, he would be a very material witness. Due to all of the above, petitioner was not ready for trial, and a continuance was requested. (T.3-5.)

At this point, in opposition to the motion, the Commonwealth's Attorney brought it to the attention of the Court that petitioner was first brought to trial on this robbery charge April 1, 1974, and during the presentation of the Commonwealth's evidence, it was first learned that the victim was seventeen (17) years of age, and thus the Court was without jurisdiction to try the matter and same would first have to be presented to the Juvenile and Domestic Relations Court. On May 7, 1974, petitioner was tried in Norfolk on another charge and suggested that petitioner and counsel had ample time to discuss this case and potential witnesses before the April 1, 1974 aborted trial and since that time in Norfolk and also in Richmond in person or by letters. The victim was in school at "Great Lakes" and it was definitely a hardship on him to return to Norfolk again in a few days or a month later. The robbery allegedly took place December 31, 1973 (T.5-7).

The Court, in the transcript, appreciated each argument and overruled Mr. Abraham's motion and sent a detective to Norfolk Packing Company with a subpoena for Melvin Horne (T.7-8). The detective reported back to the Court that the Secretary-Treasurer of Norfolk Packing Company advised him they never had an employee named Melvin Horne, but did have a Melvin Warren, but he had not been employed since over a year ago (T.8-12).

There was then a motion that the indictment was invalid, and this motion was overruled (T.13-19).

There was then a motion relative to double jeopardy, and this was likewise overruled (T.19-23).

It can be seen from the above that allegations (1) and (2) actually refer to the motion for a continuance. Such a motion is clearly within the discretion of the trial court, and, in this case, the Court did not abuse its discretion. The allegations are matters of state law and procedure and do not rise to a question of federal constitutional magnitude. *Grundler* v. *North Carolina,* 283 F.2d 798 (4th Cir. 1960). Petitioner sets forth no allegation of violation of federal constitutional rights. There is no merit in allegations (1) and (2).

In reference to allegation (3), that petitioner was tried in prison attire which prejudiced his case before the jury, petitioner has not exhausted his state court remedies in conformity with 28 U.S.C. § 2254. The transcript is so clear on this that this Court will rule upon same. Petitioner was incarcerated in Richmond, Virginia, relative to another conviction. He was transported to Norfolk the day before his trial, evidently in prison attire. He saw his attorney, Mr. Abraham, that afternoon, said attorney having been appointed to represent petitioner by Order of May 1, 1974. Petitioner told the Court he thought his trial was to be June 17, 1974, not June 13, 1974. Petitioner first advised counsel of this potential witness the afternoon of June 12, 1974. The attorney advised the Court, only due to not having had an opportunity to talk to this potential witness, he was not ready for trial (T.5). Petitioner's sister brought clothes to him the morning of trial, but he did not change—only because he had, had no opportunity to bathe before changing to said clothing (T.3). There is no merit in this allegation.

Relative to allegation (4), as to the invalid indictment, this Court has viewed the original warrant and the grand

jury indictment, and there is no merit in the allegation. Petitioner was fully aware of the charge against him and understood same. The correctness of the indictment was a matter of state law and procedure and does not raise an issue here of federal constitutional magnitude. The indictment was proper in accordance with Virginia State law and rules and procedures set forth by the Supreme Court of Virginia. Petitioner further has shown no prejudice because of the indictment as worded and the Supreme Court of Virginia denied petitioner relief on said allegation upon direct appeal.

Allegation (5) raises double jeopardy and petitioner was denied relief on same when it was raised in petitioner's state habeas corpus proceeding in the Supreme Court of Virginia. Again, this allegation refers to State laws and procedure and further, factually, the trial transcript refutes the allegation. The gist of the allegation is that during the first trial on the robbery charge, when it was then first known that the victim was a juvenile, during the Commonwealth's evidence, the trial court realized that the case should have originated in the Juvenile and Domestic Relations Court and not in the General District Court, and, in the second trial at which time petitioner was convicted June 13, 1974, said General District Court ruled on the motion that there was no double jeopardy, as at the first aborted trial, the General District Court had no jurisdiction and the proceedings were void, and even if petitioner had been convicted, the conviction would have been void. There was no double jeopardy. See Code of Virginia 16.1-158; *Watts* v. *Commonwealth,* 213 Va. 57, 189 S.E. 2nd 346 (1972). There is no merit in this allegation.

In regard to allegation (6), the only basis set forth by petitioner was that his attorney failed to raise the double jeopardy question on appeal. Petitioner exhausted his state

court remedies as to this allegation in the state habeas corpus proceeding, and relief was denied by the Supreme Court of Virginia. Since the double jeopardy allegation is without merit, there clearly is no ineffective assistance of counsel, because the attorney did not raise same upon appeal. There is no merit in this allegation.

It is ORDERED that the petition be, and it hereby is, DENIED and DISMISSED.

The petitioner may appeal in forma pauperis from this *final order* by filing a *written* notice of appeal with the Clerk of this Court, Post Office Box 1318, Norfolk, Virginia 23501, within thirty (30) days from this date. For the reasons above stated, the Court declines to issue a certificate of probable cause.

Let the Clerk send copies of this Order to the Attorney General of Virginia, the Clerk of the Circuit Court of the City of Norfolk, and to the petitioner.

RICHARD KELLAM
United States District Judge

Norfolk, Virginia
March 17, 1976

APPENDIX B

In The
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-1095

Raymond Bradley Nottingham, Jr.
Appellant,

v.

Robert F. Zahradnick, Superintendent of the Virginia State Penitentiary,
Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, District Judge.

PER CURIAM:

In his habeas corpus petition, Raymond B. Nottingham contends he was twice tried for robbery in violation of the Double Jeopardy Clause. The district court denied relief. We reverse.

Nottingham was afforded a preliminary hearing in the Criminal Division of the General District Court of Norfolk. Subsequently, he was indicted by a grand jury. The case proceeded to trial in the Circuit Court of the City of Norfolk where a jury was impaneled. During the prosecution's presentation of its case-in-chief, the trial judge learned that the robbery victim was seventeen at the time of the offense,

and thus a juvenile under Virginia Code § 16.1-141(3). The judge then declared a mistrial based upon his interpretation of Virginia law that criminal proceedings must begin by way of preliminary hearing in the Juvenile and Domestic Relations Court whenever the victim is a juvenile.

After the mistrial was declared, Nottingham, an adult, had a preliminary hearing in the juvenile court, was reindicted and subjected to a second trial. His motion to have the proceedings dismissed on double jeopardy grounds was denied. He was found guilty by the jury and sentenced to serve five years. After having exhausted state remedies, he brought this petition in federal court.

Only if we find that jeopardy attached at Nottingham's first trial are we faced with determining whether the trial judge's declaration of a mistrial was necessary under the "manifest necessity" or "ends of public justice" doctrine first enunciated in *United States* v. *Perez,* 9 Wheat 579, 580 (1824), and followed in *Illinois* v. *Somerville,* 410 U.S. 458, 468 (1973). It has been stated that where the first court is without jurisdiction, a plea of double jeopardy is unavailable at a second trial for the same offense, United States v. Ball, 163 U.S. 662, 669 (1896), presumably on the theory that a court lacking jurisdiction cannot place one in jeopardy. Virginia argues that Nottingham's first trial court was without jurisdiction.

Virginia Code § 16.1-158 (replaced by Va. Code 16.1-241) states, in pertinent part:

> Except as hereinafter provided, each juvenile and domestic relations court shall have, within the limits of the territory for which it is created, exclusive original jurisdiction . . . over all cases . . . involvng:
>
> . . . .
>
> (7) The prosecution and punishment of persons charged with ill-treatment, abuse, abandonment or neglect of children or with any violation of law which causes or tends to cause a child to come within the purview of this law, or with any other offense against a child except murder and manslaughter; provided, that in prosecution for other felonies over which the court shall have jurisdiction, such jurisdiction shall be limited to that of examining magistrate.

In *Peyton* v. *French,* 207 Va. 73, 147 S.E. 2d 739 (1966), a juvenile defendant was certified for trial as an adult despite the juvenile court's failure to provide him a hearing. Neither the juvenile nor his parents were given notice; nor were they present at the time the judge acted. The Virginia Supreme Court held:

> that a preliminary hearing in the juvenile court was jurisdictional and not procedural, and that before the circuit court could acquire jurisdiction to try petitioner there must have been a compliance with the provisions of the Juvenile and Domestic Relations Court Law. Thus, the failure of the juvenile court to comply with the applicable statutes rendered the circuit court proceedings void . . . 207 Va. at 80, 147 S.E. 2d at 743.

The statute upon which the state relies does not foreclose an interpretation of it which would permit concurrent jurisdiction with other courts not of record for preliminary hearings for adults. Under § 16.1-158(7), the juvenile court's power was restricted to determining probable cause where the accused was charged with a felony against a child. Section 16.1-127 grants to all courts not of record with criminal jurisdiction, the power to conduct preliminary examinations.

In *Peyton,* upon which the state relies, the juvenile defendant complained that the juvenile court statutes, enacted for his benefit, had not been followed. In fact, there had never been any proper court determination that the juvenile should face trial as an adult.

Here, the state failed to hold Nottingham's preliminary hearing in juvenile court. Police records from the date of the crime show the victim's age as seventeen. Nottingham, however, is an adult, not a juvenile. Nottingham's relationship with his juvenile victim was entirely fortuitous, totally lacking any familial context. The juvenile court statutes were not intended for the protection of those in Nottingham's class. Indeed, had not a juvenile been involved as Nottingham's victim, it would be entirely clear that Nottingham could not have complained if a preliminary hearing had not been held. In Virginia, a preliminary hearing in an adult criminal case is merely a procedural requirement, not jurisdictionally significant. *Synder* v. *Commonwealth,* 202 Va. 1009, 121 S.E. 2d 492 (1961). In *Snyder,* the defendant was provided a hearing but the presiding judge, who took Snyder's motion to strike the state's evidence under advisement failed to rule on it. Thereafter, Snyder was indicted by a grand jury, and was subsequently convicted. Only after his conviction did he raise any objections concerning the hearing. Upon these facts the Supreme Court of Virginia rejected his contentions. The Court interpreted Code § 19.1-163.1 (now § 19.2-218) which requires preliminary hearing in felony cases "unless such hearing is waived in writing." Because the hearing is waivable in one form, the provision could not be jurisdictional, and since not jurisdictional the court concluded that failure to timely object before trial foreclosed objection.

In Nottingham's case, a preliminary hearing before a court not of record was held before his first trial. A grand jury also had met and had determined probable cause existed to indict him, which determination the Virginia Supreme Court has held preempts an adult defendant's right to a preliminary hearing.

Finding, as we do, that there was no jurisdictional defect,

so that if a conviction had been obtained at Nottingham's first trial, it would not have been void, there was no manifest necessity for the declaration of a mistrial. In *Illinois* v. *Somerville,* supra, the Supreme Court held that a mistrial would be appropriate if after conviction the granting of a new trial would be required, but that is not the situation here. If the first trial had been permitted to proceed and Nottingham had been convicted, there would have been a perfectly valid judgment. Nor is this a case in which a trial judge has a measure of discretion based upon events occurring at the trial and his own observations. He simply misconstrued the jurisdiction of his court, and the appropriateness of what he did depends entirely upon the answer to the jurisdictional question. Since we find no want of jurisdiction, it necessarily follows that there was no necessity for the declaration of a mistrial.

The judgment is reversed and the case remanded with the direction that a writ of habeas corpus issue.

REVERSED AND REMANDED